

May 14, 1973

To Our Clients:

Breach of Contract as a 10b-5 Violation. In Walling v. Beverly Enterprises, 9th Cir., April 9, 1973, it was held that entering into a contract to purchase or to sell securities with a secret reservation not to fully perform the contract is a violation of Rule 10b-5 and that the "aborted purchaser-seller doctrine" is applicable to overcome the in-connection-with-a-purchase-or-sale-of-securities requirement of Rule 10b-5.

Registration and Holding Period Requirements for Acquisitions and Reorganizations. Formation of a holding company and change from trust to corporate status are not recapitalizations within Rule 144 (d)(4)(A), Swift & Co., CCH ¶ 79,344, and Mobile House Communities, CCH ¶ 79,352. Affiliates of companies acquired in exchange for S-1 shelf-registered shares in transactions not subject to Rule 145 will be considered underwriters subject to the same limitations on resale as under Rule 145, Beatrice Foods Co., CCH ¶ 79,351. A change of domicile merger which broadens the corporate purposes (which change could also be accomplished by charter amendment in the original domicile) to facilitate an acquisition is exempt from Rule 145 pursuant to ¶ (a)(2) thereof, The Clorox Co., CCH ¶ 79,320. Sale of assets of a subsidiary in exchange for stock as part of a plan of liquidation of the parent involving distribution to shareholders of the stock acquired requires registration pursuant to Rule 145 (a)(3)(A), Wrather Corp., CCH ¶ 79,340

Resale of Securities Issued in Bankruptcy Reorganization. Decicom Systems Inc., CCH ¶ 79,319, is a reaffirmation of the SEC position that the § 3(a)(10) and § 393 of Ch. XI of the Bankruptcy Act exemptions are transaction exemptions for the exchange with the debtor and do not exempt resales by creditors; creditors who receive large amounts of the debtor's securities and resell them to the public may be deemed underwriters. Securities issued in these transactions are not "restricted", therefore Rule 144 is not available. To be in a position to sell, the creditors should obtain registration rights.

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